Supreme Court, U.S.
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No. 99-2083

In The

Supreme Court of the United States

RITA MORENO GALLEGOS,

Petitioner,

v.

MT. SINAI MEDICAL CENTER and
UNUM LIFE INSURANCE COMPANY OF AMERICA,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

The question presented by the Petitioner should be rephrased. The question is not whether the Seventh Circuit's decision in this case is in "irreconcilable conflict" with this Court's decision in *UNUM Life Insurance Company v. Ward*, 526 U.S. 358, 119 S. Ct. 1380, 143 L. Ed. 2d 462 (1999); rather, the question is whether the Seventh Circuit was required to even consider *Ward* – a case which rested upon California's notice-prejudice rule – in the absence of such a rule in Illinois. The answer clearly is no. The Petitioner in this case failed to timely appeal her denial of disability benefits and thus failed to exhaust her administrative remedies prior to filing suit in federal court. There was no legally recognizable excuse for Petitioner's failure to exhaust, nor were the Respondents estopped from asserting Petitioner's failure to exhaust as a defense to the Petitioner's suit. *Ward* is simply not an issue, and there is no conflict in the Circuits or an important federal question involved. The Petitioner's request for a Writ of Certiorari to the Seventh Circuit should therefore be denied.

BACKGROUND

Petitioner's "Statement of the Case" omits several key facts. Accordingly, the Respondents have set forth below a brief background which is relevant to the District

Court's and the Seventh Circuit's decisions, and which supplements the facts set forth in Petitioner's Brief.

Ms. Gallegos was employed by Mt. Sinai in a position the Petitioner self-described as "Director of Marketing," and she was insured under Mr. Sinai's Employee Long Term Disability Plan ("Plan"). The Plan was underwritten by UNUM, and provided long-term disability ("LTD") benefits for employees who met the Plan's requirements. UNUM was solely responsible for evaluating claims for LTD benefits and determining each claimant's eligibility for LTD benefits under the Plan. The summary plan description given to Petitioner stated, among other things, that if Petitioner wished to appeal a benefits decision made by UNUM, she may do so "within 60 days after [Petitioner] receive[s] the insurance company's notice of denial. . . . " (App. 3a).

Petitioner stopped working at Mt. Sinai on December 16, 1994. On July 6, 1995, Petitioner applied for disability benefits under the Plan, which was supported by her attending physician's statement that she could not perform any non-sedentary occupation. UNUM awarded monthly disability benefits minus Social Security benefits which Petitioner was then receiving. Petitioner's Social Security benefits were terminated in October 1995. On January 25, 1996, the Social Security Administration ("SSA") denied Petitioner's re-application for benefits, and the Petitioner appealed the decision. (App. 4a).

Petitioner did not inform UNUM that her Social Security re-application had been denied when UNUM telephoned Petitioner on March 7, 1996, to assess the status of her appeal. In fact, Petitioner falsely stated that

there had been no ruling as of that date. On May 13, 1996, Petitioner's attending physician again stated that Petitioner was able to perform sedentary work. (App. 5a). The Petitioner's attending physician again confirmed that Petitioner was able to perform a sedentary occupation during a telephone conversation on June 6, 1996 – just one day after having examined the Petitioner. (App. 25a).

On June 11, 1996, UNUM terminated Petitioner's disability benefits based on, among other things, Petitioner's attending physician's statement that Petitioner was able to perform sedentary work, and the opinion of a vocational consultant that Petitioner's occupation of "Director of Marketing" was sedentary and available in the Chicago area where the Petitioner lived. (App. 5a, 26a). The June 11, 1996 denial letter to the Petitioner included the following statements:

> If you have any new, additional information to support your request for disability benefits, please send it to [UNUM's] attention at the above address.
>
> If you do not agree with our decision, you may have it reviewed. Should you desire a review, you must send a written request, within 60 days of your receipt of this notice. . . .
>
> If UNUM does not receive the written request within 60 days of your receipt of this notice, our claims decision will be final.

(App. 5a-6a). The Petitioner never appealed UNUM's decision, despite the fact that Petitioner was represented by an attorney who already was appealing her denial of Social Security benefits. (App. 6a).

On April 10, 1997, the SSA reinstated Petitioner's Social Security disability benefits, as of December 16, 1994. (App. 6a). This decision was based on a completely different definition of "disability" than the definition contained within the Mt. Sinai Plan, and on the report of a physician who did not administer any tests to the Petitioner, or perform an examination of the Petitioner. (App. 27a).

On April 18, 1997 – over 10 months after UNUM denied Petitioner further benefits – Petitioner's attorney wrote to UNUM to inform UNUM of the SSA's decision, and to request that the Petitioner's Plan benefits also be reinstated. The Petitioner's attorney provided no new or additional information to support the Petitioner's request for benefits other than the SSA decision. (App. 27a-28a). Moreover, the Petitioner had not seen a physician in the intervening 10 months while she chose not to appeal, contrary to the Plan requirements and leaving UNUM with no recent examinations to substantiate any continuing disability. The Petitioner's attorney did, however, recognize that the 60-day review period had lapsed. On June 4, 1997, the Petitioner telephoned UNUM, and confirmed that she had no new information to give UNUM since UNUM's previous benefits decision, and she also confirmed that she had not seen a physician since July 1996. On July 31, 1997, UNUM told Petitioner that it could not reopen her claim because she had made her request for review of the denial of benefits more than 60 days after such denial. (App. 28a-29a).

Petitioner subsequently filed suit in federal court alleging that UNUM wrongfully denied her benefits. The District Court, finding that Petitioner had failed to

exhaust her administrative remedies by not filing for a review of her claim within the 60-day deadline, entered summary judgment for the Respondents on that ground. The Seventh Circuit affirmed also on that basis. (App. 6a, 15a).

ARGUMENT

Petitioner repeatedly argues that this case "squarely present[s] the issue of *Ward*'s applicability to an ostensibly late-filed administrative appeal." This simply is not the case. *Ward* involved a specific California rule requiring that an insurer show actual prejudice from a delay in filing a proof of claim before it can avoid liability on that basis. This Court found that California's notice-prejudice rule is a "law which regulates insurance," and is therefore saved from preemption by ERISA. Accordingly, this Court held that under the particular circumstances of *Ward*, the insurer could not avoid liability based on a late-filed claim absent a showing of prejudice. *Ward*, 526 U.S. at 363-377, 119 S. Ct. at 1384-1391.

Ward did not, as the Petitioner claims, give "explicit direction to lower courts regarding the issue presented in this case," nor was *Ward*'s holding so broad in its application. Particularly, *Ward* does not establish a general notice-prejudice rule, nor does its holding apply to the facts of this case. In the Petitioner's case, the insurance contract at issue was governed by the law of Illinois. Unlike California, Illinois does not have a notice-prejudice rule, nor has any Illinois court required an insurer to show prejudice for an insured's failure to timely appeal a

benefits decision. *See, e.g., Northbrook Property & Casualty Ins. Co. v. Applied Systems, Inc., et al.*, 729 N.E.2d 915, 313 Ill. App. 3d 457 (1st Dist. 2000); *American Country Ins. Co. v. Bruhn*, 682 N.E.2d 366, 289 Ill. App. 3d 241 (2d Dist. 1997); *Kerr v. Illinois Central Railroad Co.*, 670 N.E.2d 759, 283 Ill. App. 3d 574 (1st Dist. 1996). Federal common law also does *not* require UNUM to show that it was prejudiced by the Petitioner's ten-month delay in appealing the decision to deny further benefits. Where, as here, the Petitioner presented no excuse for the delay, and could not demonstrate any reason why the Respondents should be estopped from asserting Petitioner's failure to exhaust administrative remedies as a defense to her lawsuit, summary judgment for the Respondents was appropriate and was correctly upheld by the Seventh Circuit.[1]

The Code of Federal Regulations sets forth the required ERISA internal review process: "A plan may establish a limited period within which a claimant must file any request for review of a denied claim. . . . In no event may such a period expire less than 60 days after receipt by the claimant of written notification of denial of a claim." 29 C.F.R. § 2560.503-1(g)(3). UNUM's 60-day internal appeals period is consistent with the Federal

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[1] Moreover, there is no "overwhelming evidence" supporting the Petitioner's benefit entitlement on appeal as she now claims. In fact, other than the SSA decision which was decided upon an entirely different definition of "disability" and on the report of a physician who never examined the Petitioner or performed any tests on her, the Petitioner presented no new evidence or medical records demonstrating that she was unable to perform sedentary work as her attending physician said she could.

Regulations and is consistent with the holding of *Ward*. This Court found in *Ward* that a longer period within which a claimant can file a request for review, as may be mandated by California's notice-prejudice rule, is consistent with the Federal Regulations. *Ward*, however, did *not* make any judgment that a 60-day period was not acceptable and should not be upheld by the courts, especially where there is no notice-prejudice requirement.

Without a notice-prejudice rule recognized under Illinois law, there is simply no reason why the Seventh Circuit was, or should be, required to consider *Ward*, a case which is simply inapposite to the case now before this Court. Nor has the Petitioner presented any important constitutional question that this Court need consider, or highlighted any split in the Circuits that this Court need address. This is not a question of "exceptional importance" as the Petitioner contends, and thus the opinion of the Seventh Circuit Court of Appeals should not be reviewed by this Court.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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